IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 180.

MASTERCRAFTERS CLOCK & RADIO CO.,
Petitioner,

vs.

VACHERON & CONSTANTIN-LE COULTRE WATCHES, INC., AND JAEGER-LE COULTRE, S. A.,
Respondents.

PETITIONER'S REPLY BRIEF.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is petitioner's reply to respondents' brief in opposition to petitioner's petition for writ of certiorari.

Respondents' brief assumes that respondent Vacheron is the sole source in the United States for the Atmos clock. Such is not the fact. In this connection it is stated by respondents in their brief that (p. 3):

> "In the United States and Canada, the Vacheron subsidiary of Longines, respondent here, is by contract sole distributor of the LeCoultre line, *except that Cartier, a New York retail firm, may import for its own use direct* [from the foreign distributor Jaeger-LeCoultre]". (Italics supplied by petitioner.)

Under such contract, Cartier, Inc., has sold in the United States approximately twenty Atmos clocks per year (R. Vol. II, 66) under its own trade-mark "Cartier"

(R. Vol. II, 24, 45). By reason of such contract, Cartier, Inc. has as much right to the use of the unpatented design of the Atmos clock as respondent Vacheron and Longines-Wittnauer Watch Company, Inc.

Furthermore, the Atmos clock since 1939 has been sold and extensively advertised in the United States by Longines-Wittnauer Watch Company, Inc., at least ten years before respondent Vacheron sold such clock in this country (R. Vol. II, 21, 28-30).

The existence of these independent sources for the Atmos clock in the United States makes of great public importance the question (Petition p. 3, Q. 4):

> "Did the Court of Appeals in violation of the Anti-Trust Laws of the United States, by its decision in this case vest in a plurality of independent sources in the United States a judicially created perpetual monopoly in the unpatented design of an article of manufacture under the guise of protection against unfair competition?"

It is said by respondents (p. 6) that the petition for writ of certiorari does not present a question which is of public importance as distinguished from that of the parties. The rights of the manufacturing public in the unpatented designs of an article of manufacture are of the utmost importance. Furthermore, any decision of a court such as the decision of the Court of Appeals in this case, which has the effect of creating a perpetual monopoly in the unpatented design of an article of manufacture in violation of the Federal Anti-Trust Laws, certainly materially affects the manufacturing public's rights in unpatented designs. Such a decision warrants a review by this Court to prevent the stifling and retarding of competition under a judicially created monopoly in the unpatented design of an article of manufacture.

Respondents' brief further ignores the fact that the Court of Appeals in this case decided the question of unfair competition upon confusion of goods rather than confusion of source, as it should have done had it followed the established rule of this Court as announced in *Kellogg v. National Biscuit Co.*, 305 U. S. 111 at 119, the decisions of other Courts of Appeals as well as the decisions of the State courts of New York (see cases cited p. 11, Petition).

If, as respondents urge, this Court should not review the decision of the Court of Appeals in this case, then the Design Patent Laws of the United States may as well be scrapped—this by reason of the fact that the decision of the Court of Appeals in this case creates a perpetual monopoly in an unpatented design of an article of manufacture under the guise of protection against unfair competition, subject to no public controls but the will of the producer.

There is no New York statute involved in this case, as the respondents attempt to make it appear. This case was decided by the trial court on March 1, 1954 (p. 25 Petition). The New York statute referred to by respondents on page 2 of their brief (if applicable in this case), was not the law as of that date. Such statute became effective July 1, 1954 and was not and could not have been before the trial court for consideration. Contrary to the innuendo sought to be created by respondents, such statute is not here involved.

Petitioner has succinctly shown and demonstrated (p. 20 Petition) that a recognized state of confusion exists with respect to the law of unfair competition, particularly that branch based on the copying of an unpatented design of an article of manufacture. Respondent's brief completely ignores the existence of such state of confusion. No denial of the existence of such state of confusion could

be made by respondents in view of the recognition of such confusion by the jurist who wrote the opinion of the Court of Appeals in this case (p. 46 Petition).

Respondents apparently do not take issue with petitioner's contention that the decision of the Court of Appeals in this case is contrary to the wealth of decisions of the State courts of New York on the subject of unfair competition based upon the copying of the unpatented design of an article of manufacture. In fact, petitioner does not see how respondents could take issue with petitioner's contention above stated, in view of what was said by the Supreme Court of the State of New York in the case of *American Merri-Lei Corp.* v. *Jet Party Favors, Inc.*, 97 U. S. P. Q. 484 at 485 (1953), wherein it was said:

> "* * * anyone may make anything in any form and may copy with effectiveness that which another has produced without inflicting any legal injury unless he attributes to that which he has made a false origin by claiming it to be a manufacture of another person. Any other doctrine is impossible to be maintained; for otherwise all the essential colors, all the essential forms, could be monopolized as trade-marks and exclusive rights could be created not limited in time as patents are, founded upon no public utility and subject to no public controls but the will of the adopter."

See to the same effect: *Raenore Novelties, Inc.* v. *Superb Stitching Co.*, 61 U. S. P. Q. 59 at 60 (N. Y. S.) 1944; *Mavco, Inc.* v. *Hampden Sales Assn.*, 77 N. Y. S. 2d 510 at 516 (N. Y. S.) 1948; *Walco Bead Co., Inc.* v. *Union Novelty Co., Inc.*, 89 U. S. P. Q. 647 at 649 (N. Y. S.) 1951; *Herzman Scarfs, Inc.* v. *Bear & Beards, Inc.*, 95 U. S. P. Q. 348 (N. Y. S.) 1952; *Squeezit Corp.* v. *Plastics Corp.*, 103 U. S. P. Q. 225 at 226 (N. Y. S.) 1954.

Respondents cannot escape the fact that the decision of the Court of Appeals in this case is in conflict with the

decision of this Court in *Kellogg* v. *National Biscuit Co.*, 305 U. S. 111 at 119, as well as the decision of the Court of Appeals for the Sixth Circuit in *West Point Mfg. Co.* v. *Detroit Stamping Co.*, 105 U. S. P. Q. 200,* upon the claim that the law of unfair competition based upon the copying of a design of an article of manufacture is different in a case where the design has been patented, from that in a case where the copied design was not patented. Whether the design has been patented or not, does not change the fact that the Court of Appeals in this case by deciding unfair competition because of confusion of goods rather than confusion as to source, has rendered a decision in direct conflict with the decision of this Court in the *Kellogg* case, *supra*, and the decision of the Court of Appeals for the Sixth Circuit in the *West Point* case, *supra*, as well as decisions of the State courts of New York.

The presence or absence of a patent, existing or expired, on a design of an article of manufacture, the copying of which is charged to be unfair competition, is of no significance in the determination of the clear conflict shown by the petition herein.

Furthermore, in *Zangerle & Peterson Co.* v. *Venice Furniture Novelty Co.*, 133 F. 2d 266, the Court of Appeals for the Seventh Circuit pointed out (p. 269):

> "If the plaintiff never had a patent, then the mere act of copying did not amount to unfair competition. After a patent expires, one may copy it. It then belongs to the public. The patentee's monopoly is gone. *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169 * * *. *If one never had a patent the situation is exactly the same.* Copying a design not patentable is not unfair competition. *Sinko* v. *Snow Craggs Corp.*, 7 Cir., 105 F. 2d 450."

* Petitioner is informed that a petition for writ of certiorari has been filed in *West Point Mfg. Co.* v. *Detroit Stamping Co.*, *supra*.

The Court of Appeals in this case did not, as the trial court did, decide the question of unfair competition upon the presence or absence of secondary meaning in the unpatented appearance of the Atmos clock, as is made to appear by respondents on page 8 of their brief. On the contrary, the Court of Appeals decided the issue of unfair competition upon a likelihood of *confusion of goods*, rather than confusion as to source.

The many authorities cited by respondents on page 9 of their brief are therefore not here applicable. A reading of such cases will clearly demonstrate the conflict which exists between the decision of the Court of Appeals in this case and the decisions of the State Courts of New York. This is a case where the Court of Appeals by its decision has decided the issue of unfair competition based upon the copying of an unpatented design of an article of manufacture upon confusion of goods, rather than confusion as to source. Such decision is in direct conflict with the rule of this Court as stated in *Kellogg* v. *National Biscuit Co.*, 305 U. S. 111, and the decisions of other Courts of Appeals as well as the decisions of the State courts of New York (see cases cited p. 11, Petition).

Assuming for the sake of argument, that it could be said that the decision of the Court of Appeals in this case was predicated upon a secondary meaning in the unpatented design of the Atmos clock, it nevertheless follows that the Court of Appeals by its decision has created a perpetual monopoly in such unpatented design under the guise of protection against unfair competition, subject to no public controls but the will of the producer. As pointed out by petitioner (p. 23), in the case at bar such perpetual monopoly is confined not to a single individual but to a combination of independent sources of the Atmos clock identified in the petition. By so doing, the decision of the Court of

Appeals has the effect of creating a monopoly in violation of the Anti-Trust Laws of the United States.

Respondents' brief sets forth no justified reason why the petition for writ of certiorari here sought should not be granted.

Respectfully submitted,

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PETITIONER'S SUPPLEMENTAL REPLY BRIEF

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PETITIONER'S SUPPLEMENTAL REPLY BRIEF.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner Mastercrafters Clock & Radio Co., presents this Supplemental Reply Brief for the sole purpose of calling this court's attention to the fact that in the case of *West Point Manufacturing Co.* v. *Detroit Stamping Co.*, 105 USPQ 200, decided by the Court of Appeals for the Sixth Circuit, the Detroit Stamping Co., plaintiff in said case, on July 27, 1955 filed in this court a Petition for Writ of Certiorari, the petition bearing No. 265.

Such petition is co-related to the petition in this case in that among the questions to be resolved are the important questions whether the copying of an unpatented design of an article of manufacture constitutes unfair competition notwithstanding distinctive marking as to